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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

## DAVID HUNTER.

Petitioner,

10

**TOM FELKER, Warden,**

### Respondent.

C 07-3292 MHP (PR)

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF ANSWER TO  
PETITION FOR WRIT OF  
HABEAS CORPUS**

## STATEMENT OF THE CASE

21 On July 6, 2004, the District Attorney of Alameda County filed a second amended  
22 information against petitioner David Hunter and codefendant Victor Hernandez, charging one count  
23 of second degree robbery, in violation of Cal. Penal Code §§ 211 and 212.5(c), one count of assault  
24 with a firearm, in violation of Cal. Penal Code § 245(a)(2), and one count of possession of a firearm  
25 by a felon, in violation of Cal. Penal Code § 12021(a)(1). CT 327-31. In connection with the  
26 robbery count, the information alleged that petitioner Hunter personally used a firearm within the  
27 meaning of Cal. Penal Code § 12022.5(a)(1), and personally discharged a firearm within the

1 meaning of Cal. Penal Code § 12022.53(c). CT 328. The information further alleged that petitioner  
 2 had suffered six prior convictions. CT 332-35.<sup>1/</sup>

3 On July 7, 2004, codefendant Hernandez pleaded guilty to two counts of the amended  
 4 information, while petitioner pleaded not guilty and denied the firearm use and prior conviction  
 5 allegations. CT 347.

6 On July 14, 2003, the jury convicted petitioner of assault with a firearm and being a felon  
 7 in possession of a firearm. CT 423-25. The court declared a mistrial on the robbery count after the  
 8 jury deadlocked. CT 425-26. After a bifurcated proceeding, the trial court found four prior  
 9 conviction allegations to be true, and struck the remaining two. CT 427-28.

10 On August 24, 2004, the trial court sentenced petitioner to the total determinate term of  
 11 14 years. CT 448-49. Petitioner appealed. CT 567. On February 6, 2006, the California Court of  
 12 Appeal affirmed petitioner's conviction. Exh. F.

13 On March 16, 2006, petitioner filed a petition for review. Exh. G. On May 12, 2006, the  
 14 California Supreme Court issued an order denying the petition. Exh. H.

15 On June 22, 2007, petitioner filed the instant petition pursuant to 28 U.S.C. § 2254.

## 17 STATEMENT OF FACTS

18 Respondent takes the following statement of facts from the opinion of the California Court  
 19 of Appeal:

20 The victim, David Delvin, who was described as "a street-level drug dealer," was the chief  
 21 prosecution witness at trial. Appellant and co-defendant Victor Hernandez called Delvin  
 22 at his girlfriend's residence in San Leandro during the early morning hours of April 10,  
 23 2003, and arranged to purchase methamphetamine. They all met at the residence and they  
 24 moved to the backyard. Delvin gave Hernandez a half-ounce bag of methamphetamine  
 25 to inspect. Hernandez made some comments about the drugs while appellant excused  
 himself to urinate. Appellant walked towards a nearby fence. Moments later, appellant  
 returned pointing what appeared to be a semiautomatic pistol at Delvin, ordering him to  
 hand over his money. Delvin instead rushed appellant and wrestled with him. Appellant  
 fired his gun twice, missing Delvin. While the two continued to wrestle, they moved  
 closer to a gazebo. Delvin threw appellant into the gazebo, causing appellant to fall to the

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27 1. "CT" denotes the Clerk's Transcript on Appeal, lodged with the answer as Exh. A. "RT"  
 28 denotes the Reporter's Transcript of Trial Proceedings, lodged with the answer as Exh. B.

1 ground. Delvin got on top of appellant and began hitting him. Hernandez then walked  
 2 toward them with a handgun and fired once at Delvin, striking him in the left buttock.  
 3 Delvin let go of appellant, who then fled with Hernandez over the fence into a nearby  
 4 apartment complex.

5 The only independent eyewitness to testify at trial was 14-year-old Eli M. who lived with  
 6 his mother in the residence where the shooting took place. He recalled hearing an  
 7 argument, followed by a demand from appellant to “give me your money.” Eli M. saw  
 8 appellant and Delvin “punching each other” while Hernandez pulled out a gun and fired  
 9 it three times at Delvin. Eli M. testified he did not see appellant with a gun, although he  
 10 “wasn’t really looking at him.”

11 Hernandez was apprehended shortly after the shooting, but appellant was not immediately  
 12 apprehended. Also, shortly after the shooting, appellant’s brother, Rocky Neves, was  
 13 spotted throwing a white plastic bag over a fence by a dumpster in the vicinity of the  
 14 shooting. The bag was searched and found to contain a black semiautomatic pistol.

15 The day after the shooting, appellant went to a friend’s house. The friend, Jeff Hogue,  
 16 told police that appellant showed him a silver handgun and asked him to hide it, but  
 17 Hogue refused. Hogue also said that appellant told him that he was involved in a robbery  
 18 that “went bad,” and that he needed to get out of town.

19 On May 3, 2003, Oakland police spotted appellant in a car and gave chase over several  
 20 city blocks. During the chase appellant lost control going around a corner and spun his  
 21 car 180 degrees. Appellant eventually abandoned his still-moving vehicle in a DMV  
 22 parking lot and led police on a foot chase while his car ran into the DMV building. He  
 23 was eventually arrested with the help of a police dog.

24 Exh. F at 2-3 (internal footnotes omitted).

## 17 STANDARD OF REVIEW

18 Habeas corpus review in this case is governed by the provisions of the Antiterrorism and  
 19 Effective Death Penalty Act of 1996 (the AEDPA), by which “Congress placed a new restriction on  
 20 the power of the federal courts to grant writs of habeas corpus to state prisoners.” *Williams v.*  
 21 *Taylor*, 529 U.S. 362, 399 (2000). The AEDPA prohibits relief on federal constitutional claims  
 22 unless the state ruling “was contrary to, or involved an unreasonable application of, clearly  
 23 established Federal law, as determined by the Supreme Court of the United States,” or “was based  
 24 on an unreasonable determination of the facts in light of the evidence presented in the State court  
 25 proceeding.” 28 U.S.C. § 2254(d)(1), (2).

26 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court  
 27 arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court  
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1 decides a case differently than this Court has on a set of materially indistinguishable facts. Under  
 2 the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court  
 3 identifies the correct governing legal principle from this Court’s decisions but unreasonably applies  
 4 that principle to the facts of the prisoner’s case.” *Williams*, 529 U.S. at 412-13. The test is  
 5 objective, and an unreasonable application is not merely incorrect or erroneous. *Id.* at 410-11. A  
 6 “federal habeas court may not issue the writ simply because that court concludes in its independent  
 7 judgment that the relevant state-court decision applied clearly established federal law erroneously  
 8 or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

9 “It is not enough that a federal habeas court, in its independent review of the legal question  
 10 is left with a firm conviction that the state court was ‘erroneous.’” *Lockyer v. Andrade*, 538 U.S.  
 11 63, 75 (2003) (internal citation and edits omitted). Even a showing of “clear error” falls short of the  
 12 established standard of objective unreasonability. *Id.* Where the state court denies relief without  
 13 a reasoned opinion, the federal habeas court does not review the claim *de novo*, but does “perform  
 14 an ‘independent review of the record’ to ascertain whether the state court decision was objectively  
 15 unreasonable.” *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). Also, state court factual  
 16 determinations are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C.  
 17 § 2254(e)(1). The petitioner bears the burden of showing that the state court’s decision was  
 18 unreasonable. *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

19 Even if the state court’s ruling is contrary to or an unreasonable application of Supreme  
 20 Court precedent, that error justifies overturning the conviction only if the error had a “substantial  
 21 and injurious effect or influence in determining the jury’s verdict.” *Brech v. Abrahamson*, 507 U.S.  
 22 619, 637 (1993). The *Brech* standard applies to all § 2254 cases, regardless of the type of harmless  
 23 error review conducted by the state courts. *Fry v. Pliler*, 127 S. Ct. 2321, 2328 (2007).

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## ARGUMENT

**THE STATE SUPREME COURT<sup>2/</sup> DID NOT UNREASONABLY APPLY CLEARLY ESTABLISHED FEDERAL LAW BY REJECTING PETITIONER'S CLAIM THAT HE DID NOT HAVE NOTICE THAT HE COULD BE CONVICTED UNDER AN AIDING AND ABETTING THEORY**

5        “The petition alleges that Hunter was denied his due process and Sixth Amendment rights  
6 to be clearly informed of the nature and cause of the charge against him so that he could prepare a  
7 defense. See, e.g., Petition for review, p.3 (court of appeal’s decision that several target offenses  
8 could support vicarious liability even though they had not been identified at trial or defined for jury  
9 resulted in a ‘denial of his Constitutional right to due process of law, as he was never given notice  
10 either before or during his trial that he could be found guilty of assault with a deadly weapon on any  
11 basis other than his own personal actions or because he was allegedly participating in a robbery’);  
12 id. at 18 (right to due process violated by the instruction directing jury to find Hunter guilty of armed  
13 assault if jury ‘believed that he was involved in some other unidentified offense without giving him  
14 notice of what other alleged crimes he needed to defend against.’)” Order to Show Cause at 2.

15 The state supreme court did not unreasonably deny relief on this claim. The Sixth  
16 Amendment “guarantees a criminal defendant a fundamental right to be clearly informed of the

18        2. Petitioner first raised the present claim in his petition for review, having failed to allege  
19 a violation of his federal constitutional right to notice of the charges against him in his briefing to  
20 the state court of appeal. Exh. C. Petitioner's procedurally defective presentation of his claims to  
21 the state supreme court fails to exhaust it. "Submitting a new claim to the state's highest court in  
22 a procedural context in which its merits will not be considered absent special circumstances does  
23 not constitute fair presentation." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing  
24 *Castille v. Peoples*, 489 U.S. 346 (1989)). Thus, it is not enough to simply present the federal claim  
25 in a petition for discretionary review to the state's highest court; the same federal claim must have  
26 been presented also to lower reviewing courts. *Casey v. Moore*, 386 F.3d 896, 916-18 (9th Cir.  
27 2004) ("to exhaust a habeas claim, a petitioner must properly raise it on every level of direct  
review"). Therefore, there was no appellate exhaustion where the intermediate state court was  
presented only with state law claims even though the discretionary petition to the highest court did  
present federal claims. An issue raised for the first and only time on petition for discretionary  
review is inadequate to exhaust under *Castille v. Peoples*, and the California Supreme Court will  
ordinarily not consider such claims. See California Rules of Court 8.500(c)(1) ("As a policy matter,  
on petition for review the Supreme Court will normally not consider an issue that the petitioner  
failed to timely raise in the Court of Appeal"). Petitioner's present claim is therefore unexhausted.  
This court may nevertheless deny the claim on the merits. 28 U.S.C. § 2254(b)(2).

1 nature and cause of the charges in order to permit adequate preparation of a defense.” *Sheppard v.*  
2 *Rees*, 909 F.2d 1234, 1236 (9th Cir. 1989). However, there is no clearly established federal law  
3 which guarantees a criminal defendant the fundamental right to be clearly informed that the  
4 prosecution will seek conviction on a theory of direct perpetration or aiding and abetting liability  
5 prior to the issuance of jury instructions.

6           Under California state law, direct perpetrators and aiders and abettors have long been  
7 treated as principals with equal liability (Cal. Penal Code §§ 31, 32) and allegations of principal  
8 status suffice to proceed on accomplice theories (Cal. Penal Code § 971).<sup>3/</sup> Thus, “[i]n California  
9 one may be convicted of aiding and abetting without the accusatory pleading reciting the aiding and  
10 abetting theory so long as defendant is charged in that pleading as a principal to the substantive  
11 offense and thus receives notice of the charge against him.” *People v. Greenberg*, 111 Cal.App.3d  
12 181, 188 (1980); *see also People v. Kennedy*, 116 Cal.App.2d 273, 275-76 (1953); *People v. Nolan*,  
13 144 Cal. 75, 79-80 (1904) (accessories after the fact); *People v. Gallego*, 52 Cal.3d 115, 188 (1990)  
14 (conspirators). In light of this long established California state law, petitioner must have reasonably  
15 understood that he could be prosecuted under a theory of aiding and abetting liability.

16 Moreover, constitutionally adequate notice of a charge can be provided to a defendant by  
17 means other than the charging document. *Morrison v. Estelle*, 981 F.2d 425, 427 (9th Cir. 1992);  
18 *Sheppard*, 909 F.2d at 1236 n. 2. In *Morrison*, the prosecutor provided constitutionally adequate  
19 notice of a felony-murder theory by presenting evidence of Morrison’s intent to commit robbery and  
20 by requesting felony-murder instructions at the initial charge conference. *Morrison*, 981 F.2d at  
21 428-29. It was sufficient that defense counsel had two days to prepare a closing argument after the  
22 instructions were settled. *Id.* at 428. The Ninth Circuit Court of Appeals concluded that “[n]o

3. Cal. Penal Code § 971 provides:

The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals and no other facts need be alleged in any accusatory pleading against any such person than are required in an accusatory pleading against a principal.

1 ambush occurred at Morrison's trial," *id.*, which distinguished *Morrison* from *Sheppard*, where "[a]t  
2 no time during pretrial proceedings, opening statements, or the taking of testimony was the concept  
3 of felony-murder raised, directly or indirectly." *Sheppard*, 909 F.2d at 1235. Indeed, in *Sheppard*,  
4 the state expressly conceded that "a pattern of government conduct affirmatively misled the  
5 defendant, denying him an effective opportunity to prepare a defense" against the felony-murder  
6 charge. *Id.* at 1236. The state went so far as to admit that the "defendant was ambushed." *Id.*

7 Here, petitioner cannot claim that he was ambushed by a theory of aiding and abetting  
8 liability. On June 7, 2004, the day before trial started, the prosecution requested CALJIC No. 3.02,  
9 the jury instruction on aiding and abetting liability. CT 342. This would have given petitioner  
10 notice that the prosecution was proceeding on a theory of aiding and abetting liability. For these  
11 reasons, the state supreme court did not unreasonably deny relied on petitioner's claim of inadequate  
12 notice of the charged offenses.

13 Assuming that petitioner could establish that the state supreme court unreasonably denied  
14 relief on the foregoing claim, he cannot show that the error had a "substantial and injurious effect  
15 or influence in determining the jury's verdict." *Brech v. Abrahamson*, 507 U.S. at 637. Here, the  
16 evidence of petitioner's guilt was overwhelming. Two eyewitnesses, including the victim, identified  
17 petitioner robbing and assaulting the victim. Petitioner himself told another witness that he had  
18 participated in a robbery that "went bad." In light of this strong evidence, no substantial and  
19 injurious effect from the alleged evidence appears. Petitioner therefore is not entitled to relief under  
20 the AEDPA.

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1 **CONCLUSION**

2 For the foregoing reasons, respondent respectfully requests that the order to show cause  
3 be discharged, and the petition be denied.

4 Dated: April 8, 2008

5 Respectfully submitted,

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